Editor's note: Reconsideration denied by order dated Sept. 11, 1973

FRANK O. AND DOROTHY B. O'MEA

IBLA 71-160 Decided April 2, 1973

Appeal from a decision by the Sacramento, California, Land Office, Bureau of Land Management, rejecting an application to purchase a tract of land within an unpatented mining claim pursuant to the Mining Claims Occupancy Act.

Reversed and remanded.

Mining Occupancy Act: Qualified Applicant -- Words and Phrases

"Owner". Under the Mining Claims Occupancy Act the words "a residential occupant-owner" may denote a buyer in possession of improvements under a conditional sales agreement who has not yet received legal title to the improvements. 30 U.S.C. § 702 (1970).

Mining Occupancy Act: Generally

The Mining Claims Occupancy Act is remedial in nature and is to be liberally construed. 30 U.S.C. §§ 701 et seq. (1970).

Mining Occupancy Act: Principal Place of Residence

The Mining Claims Occupancy Act only requires that valuable improvements on an unpatented mining claim constitute a principal place of residence for a qualified applicant, not that such be the principal place of residence of the applicant. 30 U.S.C. § 702 (1970); 43 CFR 2550.0-5(d).

Mining Occupancy Act: Principal Place of Residence

Establishment of a bona fide residence in order to register to vote may indicate that a principal place of residence has been established for the purposes of the Mining Claims Occupancy Act. 30 U.S.C. § 702 (1970); 43 CFR 2550.0-5(d).

APPEARANCES: Frank O. and Dorothy B. O'Mea, pro se.

OPINION BY MR. GOSS

Frank O. and Dorothy B. O'Mea have appealed from a decision of the Sacramento, California, Land Office, Bureau of Land Management, dated December 11, 1970, rejecting their application, Sacramento 622, filed pursuant to the Mining Claims Occupancy Act of October 23, 1962, 30 U.S.C. §§ 701-709 (1970), to purchase a portion of the unpatented Chaparal lode mining claim located in the Stanislaus National Forest, Calaveras County, California.

The Secretary of the Interior is authorized under 30 U.S.C. § 701 (1970), to convey "to any occupant of an unpatented mining claim which is determined by the Secretary to be invalid" an interest up to a fee simple in land within the claim. The same section also authorizes a like conveyance to any occupant "who, after notice from a qualified officer of the United States that the claim is believed to be invalid, relinquishes to the United States all right in and to such claim which he may have under the mining laws."

Section 702 defines a qualified applicant, who is eligible for a conveyance under section 701, as "a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962."

By contract entitled "Purchase Order and Deposit Receipt," dated April 2, 1960, Frank O'Mea agreed to purchase and Arthur M. Heasley and Sigridur V. Johnson agreed to sell the Chaparal mining claim herein concerned. Three hundred dollars was paid down, possession passed to buyers, and a quitclaim deed was to be delivered after the $ 40 monthly payments on principal and interest (6%) were completed.

In November 1966 a mining claim contest proceeding (S 117) was initiated against Frank O. and Dorothy B. O'Mea and their son, Douglass G. O'Mea. 1/ After an answer was filed and hearing pending, Frank and Dorothy O'Mea filed the application herein concerned pursuant to the Mining Claims Occupancy Act. Thereafter, on July 24, 1967, Frank and Dorothy O'Mea filed a relinquishment of their mining claim.

1/ Douglass G. O'Mea, who was at the time serving in the United States Navy, was joined as a party in the contest proceeding because he had by letter to the Sacramento Land Office dated June 6, 1966, claimed that he was the possessor of an interest in the claim.

On February 9, 1968, a quitclaim deed conveyed legal title to the claim and improvements from Arthur M. Heasley and Sigridur V. Heasley to Frank O. O'Mea and additionally to Douglass G. O'Mea and Dorothy B. O'Mea. On April 12, 1968, action on the contest proceeding was stayed pending a determination on the application filed in the present case. In June 1971, Douglass G. O'Mea also filed a Mining Claims Occupancy application (S 4527) and the required relinquishment of the mining claim. He claimed that he received partial ownership of the claim in April 1960, along with his parents.

In order to be eligible for a conveyance, one must be a qualified applicant. In section 702, quoted above, a qualified applicant is defined as a residential occupant-owner of valuable improvements, as of October 23, 1962. Departmental regulation 43 CFR 2550.0-5 defines "occupant-owner" and "interest":

> § 2550.0-5 Definitions.
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> As used in the Act and the regulations of this part:
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> (b) The term "occupant-owner" refers to persons who, on October 23, 1962, claimed title to valuable improvements which they or their predecessors in interest have constructed on an unpatented mining claim even though title to the improvements might ultimately be found to be in the Government. (Emphasis added.)
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> (c) The term "interest" includes any estate in lands, including, but not limited to, fee simple, life estate, estate for a term of years, lease, or permit.
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> * * * * * * *

The threshhold question concerns which persons as of October 23, 1962, owned sufficient interest in the improvements to be considered qualified as "a * * * owner" under section 702 and 43 CFR 2550.0-5, supra. As of that date, legal title to the claim was still held by appellants' predecessors in interest. A question is presented as to whether the purchase contract of Frank O'Mea is a sufficient interest for him to be considered "a residential occupant-owner" under section 702. It is significant that the article "a" was used before "residential occupant-owner" rather than "the residential occupant-owner." The term "owner" was not used to refer to the legal owner of a building affixed to the land, for the legal owner of a building on an

invalid claim is the United States. A buyer in possession under a conditional sale agreement may be termed an owner. Mesich et ux. v. Board of County Commissioners of McKinley County, 46 N.M. 412, 129 P.2d 974 (1942); Siestreem v. Korn, 43 L.D. 200 (1914).

The Mining Claims Occupancy Act is remedial in nature. As such, it should be liberally construed. Attix v. Robinson, 155 F.Supp. 592 (D.C. Montana, 1957); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5701 (1943). Under his purchase contract it is concluded that Frank O'Mea, as of April 2, 1960, should be considered as an owner of the claim and improvements for the purposes of the Act.

A more difficult problem exists as to Dorothy and Douglass O'Mea. Frank O'Mea indicated by letter to the Bureau of Land Management dated August 26, 1967, that Douglass had held an undivided interest in the mining claim since 1962. However, in the application submitted, the files, and the official county records, there is no reference to a record of any interest in Douglass O'Mea or in Dorothy O'Mea until the February 9, 1968, quitclaim deed. Section 8 of the Act, 30 U.S.C. § 708 (1970), states that "Rights and privileges to qualify as an applicant under this chapter shall not be assignable, but may pass through devise or descent." A person who acquired his interest in an unpatented mining claim after October 23, 1962, by a method other than devise or descent, cannot be considered a qualified applicant under the Act. Walter L. Hurlburt, et al., 7 IBLA 255 (1972). It is concluded that neither Dorothy O'Mea nor her son have submitted adequate proof of ownership of an interest as of October 23, 1962, in order to be considered occupant-owners under the Act. 2/

The remaining question is whether the mining claim constituted a principal place of residence for Frank O'Mea. By decision of August 16, 1968, the Land Office rejected appellants' application holding that appellants had failed to establish the improvements on the mining claim as "a principal place of residence" as that term is used in section 702 of the Mining Claims Occupancy Act and as defined in 43 CFR 2550.0-5(d):

> The term "a principal place of residence" means an improved site used by a qualified applicant as one of his

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2/ It is recognized that California is a community property state, and that the payments made by Frank O'Mea may well have been from community funds in part belonging to Dorothy O'Mea. If an affidavit to this effect is filed herein, Mrs. O'Mea's ownership will have been sufficiently established and she should be treated as a qualified applicant along with her husband.

> principal places of residence except during periods when weather and topography may make it impracticable for use. The term does not mean a site given casual or intermittent residential use, such as for a hunting cabin or for weekend occupancy. (Emphasis added.)

The appellants appealed the Land Office decision to the Office of Appeals and Hearings, Bureau of Land Management. The Office of Appeals and Hearings affirmed the Land Office's rejection of the application. Appellants then appealed to the Secretary of the Interior. In an opinion by the Assistant Solicitor, Frank O. O'Mea and Dorothy B. O'Mea, A-31084 (January 27, 1970), the decision of the Office of Appeals and Hearings was set aside and the case remanded to the Land Office. In the January 27, 1970, opinion it is stated:

> The evidence, as a whole, tends to show that appellants utilized the mining claim, perhaps a third of the time, each year from the time of their acquisition of the property in 1960 to the time of the filing of their application in 1967, such use occurring on weekends and during vacations, while the remainder of the time was spent by appellants at their home in San Francisco.

Appellants were then afforded the opportunity to make a showing as to whether the residency requirement had been met by appellants' predecessors in interest 3/ for the years 1955-1960.

Appellants complied with the Land Office request to file explanatory material concerning the nature and use of improvements by appellants' predecessors in interest, Marion Davis and Arthur M. Heasley. The material was transmitted by the Sacramento Land Office to the Forest Service for evaluation. The Forest Service recommended that appellants should be found not qualified on the basis that Arthur M. Heasley did not use the mining claim as a principal place of residence and also that appellants, themselves, did not use the claim as a principal place of residence.

The Sacramento Land Office by decision of December 11, 1970, again found that appellants were not entitled to relief under the Act. The decision concluded:

> The O'Meas have failed to make a showing that the claim was their principal place of residence from the

3/ The record shows that Marion Davis held the claim in 1949 until transferred to Arthur M. Heasley and Benny C. Nugent in 1957. In 1959 Benny C. Nugent conveyed 1/2 interest to Sigridur V. Johnson.

> time of their purchase of the claim in 1960 until the enactment of the act on October 23, 1962, and are therefore not qualified applicants, and their predecessor, Arthur Heasley, did not use the claim as his principal place of residence. The application must therefore be rejected.

Appellants are correct that the Land Office decision of December 11, 1970, was erroneous in requiring that Arthur Heasley use the claim as "his principal place of residence" and that appellants use the claim as "their principal place of residence." Valuable improvements on a mining claim need not be the principal place of residence of an applicant, but need only be "one of his principal places of residence." 43 CFR 2550.0-5(d).

The term does not, however, include casual or intermittent residential use such as for a weekend cabin or hunting lodge. Appellants proffered depositions as evidence that their predecessors in interest used the improvements on the mining claim as a principal place of residence. While the depositions could be more clear, it is apparent that Marion Davis, who took over the claim in 1949, built a cabin thereon and used it as a principal place of residence until he sold the claim to Benny C. Nugent and Arthur Heasley in 1957. Arthur Heasley stated in his deposition that he was in business as a public accountant in the nearby West Point area, that the claim was a regular and principal place of residence for him from 1957 until the sale to O'Mea in 1960, and that he spent one-third to one-half his time residing on the claim. Benny C. Nugent conveyed his one-half interest in the claim to Sigridur V. Johnson in June 1959. Although the record contains no report of any occupancy by either Benny C. Nugent or Sigridur V. Johnson, the depositions submitted do establish that, for purposes of the Act, the cabin on the mining claim was used sufficiently as a principal place of residence by Marion Davis and Arthur Heasley, predecessors in interest to Frank O'Mea, from the time of its construction until the claim was sold to Frank O'Mea in April 1960.

Appellants maintain on appeal that they intended to establish their domicile at the Chaparal claim and that they did sufficient acts to thereby establish it as their domicile. They rented a post office box in West Point in 1960; they registered to vote in the West Point precinct of Calaveras County in 1960; they obtained California resident hunting licenses using their West Point post office box as their address; and they registered their automobile, their pickup truck and also their dogs in Calaveras County. Mr. O'Mea recuperated at the cabin for three months (October, November, and

December 1962) following a heart attack. These acts, coupled with the fact that they regularly spent weekends and vacation time at the cabin, they contend, are sufficient to establish the cabin as a principal place of residence.

The determination as to the qualifications of an applicant must be made on the basis of facts as they existed on or prior to October 23, 1962. Occupancy subsequent to that date is not determinative of one's ability to qualify under the act. Ola N. McCulloch Sibley, 73 I.D. 53, 56 (1966). Therefore, Mr. O'Mea's presence on the claim in November and December 1962 has no bearing on his qualifications. However, following his release from the hospital in early October, Mr. O'Mea resided on the claim for the remainder of the month of October. It is significant that Mr. O'Mea traveled to the cabin on the claim to recuperate during a critical time in his life, and that he selected his Calaveras County residence in preference to his San Francisco residence for his recuperation.

The acts of registration and the securing of a mailing address are not conclusive evidence that the claim was used as a principal place of residence. Such acts must be coupled with physical presence in order to be qualifying. However, we feel that the change of voting registration of both the O'Meas to the West Point residence is significant. Registering to vote in Calaveras County qualified appellants to participate in the decision-making processes of the local government and agencies in that county, and also qualified them to become candidates for local elective offices. Such registration foreclosed their electoral voices in community affairs at their San Francisco residence. In the United States the establishment of residence for voting purposes is of great importance; a voting residence bona fide under state law would not be classified as a "casual or intermittent residential use."

The Department has previously cited the failure to change voting registration as a factor in determining that a mining claim had not been used as a principal place of residence. In Robert A. and George C. Johnson, 75 I.D. 361, 362 (1968), the Assistant Solicitor affirmed the Sacramento Land Office finding that the Johnsons did not use their mining claim as a principal place of residence. The Land Office report cited, among other factors for rejecting the Johnsons' application, that the applicants maintained voting residences in San Jose, California, and also that they received their mail in that city rather than at their mining claim.

For these reasons we find that appellant Frank O'Mea is a qualified applicant within the meaning of section 702 and that the cabin on the Chaparal mining claim constituted a principal place of residence for him and his predecessors in interest for the seven years prior to July 23, 1962.

According to 30 U.S.C. § 703 (1970), where the lands for which application is made have been withdrawn in aid of a governmental unit other than the Department of the Interior, the Secretary of the Interior may convey an interest in the land only with the consent of the head of the governmental unit concerned. In this instance the land sought by appellant is located in a national forest. For that reason it is for the head of the Forest Service to determine the nature of the relief, if any, that should be granted to Frank O'Mea. Bernice H. Doll, A-31141 (April 27, 1970).

Since the relinquishment of the interest of Frank and Dorothy O'Mea in the mining claim was prior to the deed to them of the remaining interest of their predecessors, they should execute a second relinquishment of all interest in the claim prior to any conveyance under the Mining Claims Occupancy Act.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded for further action consistent herewith.

Joseph W. Goss, Member

We concur:

Douglas E. Henriques, Member

Anne Poindexter Lewis, Member.